IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 19.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.Nos. 412 and 571 of 2018

and Application No.3813 of 2018

O.P.Nos. 412 of 2018

Steel Authority of India Ltd.,
Rep. By SAIL CMO
Sathankadu, Manali,
Chennai – 600 0068. . . . Petitioner

Versus

K.Gauthaman,
Railway Contractor,
273, Salem Main Road,
Bommidi,
Dharmapuri District.
Pin – 635 301. . . . Respondent

PRAYER in O.P.No.412 of 2018 : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 15.02.2018 passed by the Arbitral Tribunal in connection with the contract agreement Ref.No.SAIL/CMO/SR/EMD/CHE-Rly.Sdg/13-14 dated 12.03.2014 between the petitioner and respondent with cost of the petition and order costs of the petition.

For Petitioner : Mr.A.Ilango
For Respondent : Mr.V.G.Suresh Kumar

O.P.No.571 of 2018

K.Gauthaman,
Railway Contractor,
273, Salem Main Road,
Bommidi,
Dharmapuri District.
Pin – 635 301.

.....Petitioner in O.P.No.571 of 2018

vs.

1. Director (Commercial)
Chief Executive,
Central Marketing Organization,
Steel Authority of India Limited,
ISPAT Bhavan, Lodhi Road,
New Delhi.

2. Deputy General Manager (M&-EM)/SR,
Steel Authority of India Limited,
ISPAT Bhavan, Lodhi Road,
New Delhi. . . . Respondents in O.P.No.571 of 2018

PRAYER in O.P.No.571 of 2018 : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 15.02.2018 made in relation to disputes arising out of W.O.No.SAIL/CMO/SR/EMD/CHE-Rly.Sdg/13-14 in so far as disallowing of claims towards reimbursement of service tax in the sum of Rs.10,51,000/- and payment of compensation in the sum of Rs.2,50,000/- are concerned.

For Petitioner : Mr.V.G.Suresh Kumar

For Respondents : Mr.A.Ilango

COMMON ORDER

O.P.412 of 2018 has been filed challenging the Arbitral award in respect of awarding interest on the ground that, when the parties themselves agreed in the contract not to claim any interest, awarding of interest by the Arbitrator is beyond the scope of contract.

2. O.P.No.571 of 2019 has been filed challenging the award disallowing certain claim made by claimant, particularly, the claim with regard to reimbursement of 50% of the Service Tax and compensation claimed as damages.

3. Since these two Original petitions arise out of the same award, this Court is inclined to dispose of the two original petitions by a common order.

4. The facts leading to filing of these original petitions are as follows:

5. For the sake of convenience, the parties are referred to by the rank in the Arbitral proceedings.

6. The claimant is the petitioner in O.P.No.571 of 2018. The respondent in Arbitral Tribunal has filed O.P.No.412 of 2018. The tender was called for appointment of contractor for revamping of Railway siding at SAIL Warehouse, Sathangadu, Manali, Chennai. The Contract was awarded to the claimant on 12.03.2014 for a sum of Rs.3,14,38,050/- and on the same day, the agreement also came to be executed. The Completion period of contract is 6 months as per the work order and the default liability period is 12 months from the date of issue of acceptance certificate/take-over of the work.

7. As some disputes arose between the parties, the matter was referred to the Arbitrator. The main dispute raised by the claimant is non payment of the dues and delayed payment of final bill.

8. The Claimant has raised the following claim:

i. Interest for the delayed payment of final bill amount for a period of 10 months on Rs.11,22,844/-	Rs. 1,80,102/-
ii. Reimbursement of service tax paid by the respondent	Rs.10,51,000/-
iii. Interest for non-reimbursement of service tax	Rs. 4,07,329/-
iv. Compensation of delayed payment of final bill	Rs. 2,50,000/-
Total	Rs. 18,88,431/-

9. The respondent's contention before the Arbitrator is that, Clause 11 of the Special Conditions of Contract provides that the rates quoted shall include all taxes and royalties, duties, levies, Octroi, labour cess up to 2% as applicable etc., except service tax and no claim shall be entertained on account of increase under these heads during the currency of this contract. Service tax, if applicable, will be reimbursed by SAIL on production of documentary evidence of having paid the same and on submission of documents to SAIL in original. Moreover, Clause 7 and 7.3 of the Special Conditions of Contract provides that "rate" and the quoted rates should be inclusive of, the Building and other Construction Workers Welfare Cess as applicable therein, of the value of the construction cost depending upon the notification of State Government where the construction site is located.

10. Hence, the contention of the respondent is that Service Tax is also included while quoting the rates. Since the contract is Worker's Contract, service provider has to pay 50% of the tax and remaining 50% shall be paid by the Service Receiver. Hence, the respondent disputed the liability.

11. The learned Arbitrator while allowing the claim of the claimant for delayed payment of final bill, rejected the reimbursement of service tax and interest for non-reimbursement of Service Tax and finally, a compensation of a sum of Rs.90,051/- towards interest for the delayed payment of final bill was granted to the claimant and the counter claim pleaded by the respondent for return of 50% of Service Tax paid by them was also disallowed.

12. Aggrieved over the same, these original petitions are filed.

13. Learned counsel for the respondent in Arbitral Tribunal and the petitioner in O.P.No.412 of 2018 submitted that awarding of interest by the learned Arbitrator is beyond the scope of the contract and also against the provisions of Section 31(7)(a) of the Arbitration and Conciliation Act, hence, submitted that the award is in violation of the contract and also substantial provisions of law and therefore, the same is liable to be set aside as far as awarding of interest alone is concerned and in respect of other aspects, the award should be confirmed.

14. Per contra, it is the main contention of the learned counsel for the claimant Mr.V.G.Suresh Kumar before the Arbitral Tribunal and the petitioner

in O.P.No.571 of 2018 that, despite the fact that the respondent agreed to return the Service Tax in the contract, the learned Arbitrator has ignored the specific Clause agreed upon between the parties and rejected the refund of service tax. It is his contention that, 50% of Tax has to be paid as per the notification of the year 2012 and the Contract was entered much after the notification and the respondent has agreed to repay the amount paid towards certain tax, which makes it clear that the respondent, in fact, agreed to repay and reimburse the Service Tax. Once they have agreed to reimburse the Service Tax, they cannot go beyond the contract.

15. The learned counsel for the claimant further contended that the learned Arbitrator has ignored the vital Clause agreed between the parties, namely, Clause 11 of the Contract. In fact, before the Arbitral Tribunal, the respondent also made a counter claim for reimbursement of the Service Tax, which itself clearly indicates that they clearly understood their liability to return the service Tax paid by the claimant. Therefore, it is his contention that, ignoring of the vital Clause and rejection of the claim by the Arbitrator is against the very contract. Similarly, though there was enormous delay in payment of money, which has been accepted by the learned Arbitral Tribunal, the interest has not been fully paid and the compensation for loss has also not

been ordered by the Arbitrator. Hence, it is his contention that the learned Arbitrator ought to have awarded the refund of Service Tax as agreed between the parties in the contract. It is his further contention that, even though "no claim certificate" is submitted by the claimant, it will not a bar for the claimant to claim any dues which is legally payable to him. Hence, the learned counsel prayed for allowing of O.P.No.571 of 2018 and dismissal of O.P.No.412 of 2018.

16. On a perusal of the Arbitral award, it is seen that the learned Arbitrator has rejected the entire claim, except some portion towards interest. It is not in dispute that final bill has been paid with some delay. This factual aspect is not denied by both sides. It is relevant to note that the only dispute is with regard to the award of interest and also the reimbursement of the Service Tax.

17. To analyse these aspects, Clause 6.6 of the Special Conditions of Contract is relevant to be extracted hereunder :

> ***"6.6.*** *No claim for interest will be entertained by the company in respect of the deposits mentioned in the contract or in respect of any money or balance which may be in their hands owing to any dispute between Company and the contractor or*

in respect of any delay on the part of the Company in making payment of running bills, final payment or otherwise."

18. The above clause is unambiguous and clear that, if any delay has occurred in respect of payment of final bill or running bill, no interest will be payable. When the parties have specifically agreed upon that aspect, awarding of interest for delayed payment is against the very contract, and Section 31 of the Arbitration and Conciliation Act. In this regard, Section 31(7) of the Act makes it very clear that, if there is an agreement between the parties in respect of payment of interest, the Tribunal cannot go beyond that contract. Only in the absence of any such contract between the parties, payment of interest is left to the decision of the Tribunal, wherein, in the case on hand, the aforesaid clause clearly bars the parties from claiming any interest for any delay in payment of running bill or final bill.

19. In such view of the matter, awarding of interest by the learned Arbitral Tribunal is against the very contract and beyond the very contract itself. The learned Arbitral Tribunal has awarded interest contrary to the agreement and learned Tribunal has ignored the clause agreed upon between the parties, particularly, with regard to the interest, and therefore, such an award, ignoring

or not considering the relevant materials and contract governing the parties, is nothing but suffers from patent illegality.

20. **Accordingly, the Arbitral award with regard to the interest portion, which is the subject matter of O.P.No.412 of 2018, is hereby set aside.**

21. As far as O.P.571 of 2018 is concerned, the main bone of contention is with regard to the reimbursement of 50% of Service tax, paid by Service Provider, namely, the claimant herein. The main thrust of the reimbursement is based on Clause 11 of the Special conditions of Contract Agreement entered between the parties. Clause 11 is extracted hereunder :

> *"**11.**The rates quoted shall include all taxes and royalties, duties, levies, Octroi, labour cess up to 2% as applicable etc except service tax and no claim shall be entertained on account of increase under these heads during the currency of this contract. Service tax if applicable will be reimbursed by SAIL on production of documentary evidence of having paid the same and on submission of documents to SAIL in original."*

22. Though it is contented by the respondent that the rates quoted include Service Tax, such contention cannot be countenanced for the simple reason that, the service Tax has been specifically excluded in Clause 11. Be that as it may, what was agreed by the respondent as per Clause 11 is that, *Service Tax, if applicable, will be reimbursed by SAIL on production of documentary evidence of having paid the same and on submission of documents to SAIL in original.* Hence, it is the contention of the claimant that, since the SAIL has agreed to reimburse the Service Tax paid on production of the evidence, they are entitled to be reimbursed with the Service Tax paid by them.

23. From the submissions of the learned counsel on either side, it is seen that they have paid Service Tax and produced the documents. It is to be noted that, what was agreed in the contract in the above Clause is that reimbursement, if applicable as per law, will be reimbursed. The word 'if applicable' would indicate that the reimbursement of Service Tax is not automatic. It is subject to the sanction of the Statute. In this regard, it is also relevant to note that the learned Arbitrator has clearly referred to the notification issued by the Government of India, Ministry of Finance, Department of Revenue

bearing No.30/2012-Service Tax dated 12.06.2012, issued under Sub Section 2 of Section 68 of the Finance Act 1994(32 of 1994) and has disallowed the claim for reimbursement. The above notification, when perused, makes it very clear about the nature of the liability and the nature of Tax payable by the Service Provider and Receiver. The above notification makes it very clear that the liability of the Service provider is to pay the Service tax at the rate of 50% of the Tax. Similarly, the nature of Service Tax payable by the Service provider, i.e., the person who provides the service, and the person who receives the service, has been clearly fixed in the above notification, viz., 50% to be paid by the person who provides the service and 50% by the person who receives the service. When the law itself mandates that service provider has to pay 50% of the Service Tax, in the absence of any provision in the statute for reimbursement, it cannot be said that merely on the basis of the agreement, the person is entitled to repay all the service tax.

24. Therefore, this Court is of the view that the view that Arbitrator rejecting the claim in that regard is well within Law. Even by interpreting Clause 11 as indicated above, it is not the case where there is a clear agreement between the parties to reimburse 50% of the Tax and such a reimbursement agreed is always subject to law only. The word 'if applicable' found in the very

contract makes it clear that such reimbursement is only subject to sanction of the law. Therefore, the contention of the learned counsel with regard to reimbursement of Service Tax cannot be countenanced.

25. With regard to other aspect, viz., compensation, absolutely, there is no evidence available on record to show that the petitioner has suffered any damage to claim compensation due to delay in payment of bills. Unless and until damages have been established or the loss due to the damages has been established, the damages cannot be ordered automatically without any proof of loss.

26. Therefore, in any event, the learned Arbitrator's award does not suffer from any infirmity as far as the claim of the claimant is concerned, and the claimant has not made out any of the ground admissible under Section 34 of the Act to interfere with the well reasoned award. **Accordingly, the award of the learned Arbitrator, rejecting the claim for reimbursement and compensation, stands confirmed.**

27. In fine, O.P.No.412 of 2018 is allowed and O.P.No.571 of 2018 is dismissed. No costs. Consequently, connected application is closed.

19.07.2021

msv

N. SATHISH KUMAR,J.

msv

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